From:	Elizabeth Goldmann
To:	Goldmann, Elizabeth
Subject:	Fw: Link to LA District"s Santa Cruz River TNW determination
Date:	Tuesday, October 25, 2016 10:28:47 AM
Attachments:	COE SCR TNW Determinations Memo 2008_05_23.pdf SCR TNW Exhibit A.pdf Q&A for SCR TNW.pdf

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----- Forwarded by Elizabeth Goldmann/R9/USEPA/US on 10/25/2016 10:27 AM -----

Document Log Item

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From	**To**	
Jessica Kao/R9/USEPA/US	Karyn Wendelowski/DC/USEPA/US@EPA Karyn Wendelowski/DC/USEPA/US,	
CC	**BCC**	
Kevin Minoli/DC/USEPA/US@EPA		
Description		Form Used:
Subject	**Date/Time**	
Re: Fw: Link to LA District's Santa Cruz River TNW determination	07/02/2008 01:42 PM	

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3	1,843,375		Jessica Kao

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Body

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The files are big so I'm sending them in two installments.

(See attached file: COE SCR TNW Determinations Memo 2008_05_23.pdf)(See attached file: Q&A for SCR TNW.pdf)(See attached file: SCR TNW Exhibit A.pdf)

Karyn Wendelowski/DC/USEPA/US

Karyn Wendelowski/DC/USEPA/US

07/02/2008 07:57 AM

To: Jessica Kao/R9/USEPA/US@EPA

cc: Kevin Minoli/DC/USEPA/US@EPA

Subject: Re: Fw: Link to LA District's Santa Cruz River TNW determination

Jessica - Kevin and I aren't able to access the determinations; if you are, could you please send us a pdf? Thanks!

Jessica Kao/R9/USEPA/US

Jessica Kao/R9/USEPA/US

07/01/2008 06:48 PM

To: Kevin Minoli/DC/USEPA/US@EPA, Karyn Wendelowski/DC/USEPA/US@EPA

cc:

Subject: Fw: Link to LA District's Santa Cruz River TNW determination

See email below. b5 deliberative attorney client [redacted]

[redacted]

-----Forwarded by Jessica Kao/R9/USEPA/US on 07/01/2008 03:19PM -----

To: Karyn Wendelowski/DC/USEPA/US@EPA
From: Jessica Kao/R9/USEPA/US
Date: 06/13/2008 12:51PM
Subject: Link to LA District's Santa Cruz River TNW determination

In case info re. this determination is needed, here's the link to COE's SCR TNW press release, which has links at the bottom to the determination itself and Q & A. Lance W and DOJ also reviewed some

draft versions of these documents.

http://www.spl.usace.army.mil/cms/index.php?option=com_content&task=view&id=911&Itemid=2

b5 deliberative attorney client [redacted]

Have a good weekend!

CESPL-RG-A 23 May 2008

MEMORANDUM FOR THE RECORD

SUBJECT: Determination of Two Reaches of the Santa Cruz River as Traditional Navigable Waters (TNW)

Summary

The Corps' Los Angeles District has determined that two reaches of the Santa Cruz River, Study Reach A from Tubac gage station (USGS # 09481740) to the Continental gage station (USGS #09482000) and Study Reach B from Roger Road wastewater treatment plant (WWTP) downstream to the Pima/Pinal County line, Arizona, as shown in Exhibit A, are TNWs (collectively, referred to as the "Study Reaches"). This determination is consistent with the Clean Water Act (CWA), the agencies' regulations (including 33 C.F.R.§ 328.3), relevant case law, and existing guidance, including the June 5, 2007 joint U.S. Environmental Protection Agency and Department of the Army legal memorandum entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Rapanos Guidance) and *Appendix D* of the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* issued June 5, 2007 (Appendix D).

Background

The Santa Cruz River originates in Arizona, flows south into Mexico, and then flows north again into Arizona. It is the primary river which flows from Nogales, Mexico through Tucson, Arizona, and a number of Indian reservations, including Tohono O'odham Nation (TON), to the Gila River near Phoenix. The watershed of the Santa Cruz River is approximately 8,600 square miles. Until the late nineteenth century, the Santa Cruz River was primarily a perennial watercourse that served the region's agricultural needs until a quickly developing industrial society began to tap the river's subsurface flow (Exhibit B).

The Upper Santa Cruz River Valley, located between Nogales, Arizona on the US-Mexico border, and extending 65 miles north to the major urban area of Tucson, has a long history of European settlement spanning three centuries. Prior to the discovery of the area by European explorers, the area was inhabited for thousands of years by aboriginal native peoples. The Santa Cruz River has long been an important corridor for trade and exploration. The river and its well-established riparian habitat have served as a vital commodity for people and wildlife in the region.[1]

In addition to the use of the Study Reaches by recreational watercraft described in case-specific analysis below, in the mid 1850s, William Rowlett and his brother, Alfred, constructed an earthen dam on the Santa Cruz River south of the present-day Silverlake Road. They also installed a water-powered flour mill at this location in 1857/58. In 1860, William Grant purchased the flour mill and the dam/lake and improved the dam and mill in order to supply military posts in the southwestern region. He built a second, larger mill on the river and purchased the machinery in California. However, the mill was burned in 1861 to keep it from falling into Confederate hands. The mill was purchased by James Lee and returned to operations in 1864. In 1884, the mill, dam,

[1] *The Santa Cruz River: A Resource Shared by Two Cities* by Hugh Holub, paper presented to the Border XXI EPA Regional Water Sub Work Group Meeting on March 6, 2001, Nogales, Sonora.

and lake were sold to Frederick Maish and Thomas Driscoll who developed the Silver Lake Resort. In 1883, Solomon Warner built a second dam and mill on the river. The lake was approximately 60 acres, 8 feet deep, and the *Arizona Citizen* reported the use of a flat-bottom boat on the lake. Waterfowl populated the lake and hunting organizations claimed exclusive rights to shooting the waterfowl. The dams at both Silver Lake and Warner's Lake were breached by floods in 1886 and 1887; the *Arizona Star* reported on July 13, 1887 that the river was wide and deep enough to float a "mammoth steamboat." In 1888, Frank and Warren Allison purchased Warner Lake, repaired the dam, and stocked the lake with carp for commercial fish production selling over 500 pounds of fish per day. Both dams were washed out by 1890.[2]

Further, in the summer of 1951, Glenton G. Syke, Tucson city engineer, navigated the Santa Cruz River in a 14-foot-long boat from the San Xavier del Bac Mission to Congress Street in Tucson.[3]

The Study Reaches were selected based on personal knowledge of the river by Regulatory staff, evidence of perennial flows based on stream gage data, and more readily available evidence of navigability.

Basis for TNW Determination

The Rapanos Guidance indicates that in its context, the term TNW refers to those waters that are under the jurisdiction of the Corps, pursuant to 33 C.F.R. § 328.3(a)(1), (i.e., "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."

As stated in Appendix D: "when determining whether a water body qualifies as a "traditional navigable water" (i.e., an (a)(1) water), relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. § 320.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. Part 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by the federal courts."

To determine whether the Study Reaches are a TNW, in accordance to 33 C.F.R. § 328.3(a)(1), a case-specific analysis to evaluate whether the Study Reaches are navigable-in-fact, including consideration of its potential susceptibility to interstate and foreign commerce, was undertaken. The Corps has determined that the Study Reaches are a TNW based on the following factors:

1. The physical characteristics of the Santa Cruz River within the Study Reaches indicate that they have the capacity and susceptibility to be navigated by recreational watercraft.

A. Study Reach A is approximately 22 miles in length. The river near Tubac is typically more confined in ordinary flows to a channel approximately 15-20 feet wide with an approximate 1.5 mile wide, densely vegetated floodplain. Downstream of Amado, the floodplain increases in width to approximately 2.5 miles; the river channel is less confined, less vegetated, and more braided. Exhibit C shows monthly and daily flows for the Tubac, Amado, and Continental gage stations, as well as peak flows for the Amado and Continental gage stations (Tubac information unavailable). The monthly gage data indicate perennial flow at Tubac since

[2] History of Navigation of the Santa Cruz River by Don Bufkin, citation unknown.
[3] Admiral of the Santa Cruz by Glenton G. Sykes, The Journal of Arizona History, Vol. 20, Number 4, Winter, 1979.

1996, flow most months at the Amado gage station since 2003 (prior years unavailable), and intermittent flows at the Contintental gage station.[4] Average daily flows are typically lower in May and June but increase during the summer monsoon season which typically begins in July. Average daily flow rates again typically increase during December and January. The gage data indicate the highest daily mean value at the Tubac gage station over the last 11-12 years was 637 cubic feet per second (cfs) during October and the lowest daily mean value at the same station during the same period was 4.5 cfs during June. The highest daily mean values typically occur from July-October.[5] The range of mean monthly flows (6.9 to 78 cfs) and the average daily flow in a representative year of 35 cfs indicate perennial flow at the Tubac gage station. The mean monthly discharge information at the Amado gage station is only available since October, 2003; the mean monthly discharge at this station in the last four years varied from .97 cfs to 67 cfs while the daily mean flow chart at the Amado gage station indicates perennial flow. The mean monthly discharge at the Continental gage station since 1940 varies from .43 cfs to 76 cfs while the mean daily values since 1939 shows flow daily with the exception of mid to late May through mid-June. This is expected since the river begins subsurface flow at this point, which defines the downstream end of this Study Reach.

B. Study Reach B is approximately 32 miles in length. The width of the riverbed varies from approximately 280 feet at the Roger Road WWTP to approximately 670 feet at Cortaro and approximately 575 feet at Trico Road while the active (ordinary flow) river channel at all three locations varies from 40-60 feet; at one location within this Study Reach, the river diverges into two similarly-sized channels. The river in Study Reach B is often confined at its maximum width by steep banks with soil cement or other bank stabilization in several locations. In other locations, for example at Ina Road, the river has lower, easily accessible, vegetated banks. Some areas are more densely vegetated than others. Exhibit C shows monthly, daily, and peak flows for gage stations at Cortaro and Trico Road (just upstream of the Pima/Pinal County line). Average daily flows are typically lower in May and June but increase during the summer monsoon season which typically begins in July. Average daily flows again typically increase during December and January. The highest average daily mean value at the Cortaro gage station over the last 57-60 years was 703 cfs, also in October, and the lowest average daily mean value at the same station over the same period was 22 cfs during June. The average monthly discharge ranges from 23 to 124 cfs and the average daily flow in a representative year of 75 cfs indicate perennial flow at the Cortaro gage station. At the Trico Road gage station, since 1997, the average monthly discharge ranged from 3.5 cfs to 710 cfs and daily mean values since 1989 ranged from 11 cfs to 863 cfs. The gage data document perennial flow at the Cortaro and Trico Road gages every month since 1996 with the exception of October, 1996.[6]

C. The peak flow charts demonstrate the frequency of flows which exceed 1,000 cfs.[7] Peak flow data is unavailable at the Tubac gage station; however, the maximum peak flow at the Amado gage station since 2004 was approximately 7,800 cfs and peak flow has approached or exceeded 2,000 cfs annually. The maximum peak flow at the Continental gage station was approximately 45,000 cfs in the early 1980s and the minimum peak flow has exceeded 1,000 cfs 63 times since 1940. The maximum peak flow at the Cortaro gage station exceeded 60,000 cfs in the early 1980s and has exceeded 1,000 cfs on an annual basis from 1940-1988 with the exception of once in the 1940s and once in the 1950s; the peak flow at the Cortaro gage station

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[4] http://nwis.waterdata.usgs.gov/az/nwis/monthly
[5] http://nwis.waterdata.usgs.gov/az/nwis/dvstat
[6] Ibid
[7] http://nwis.waterdata.usgs.gov/az/nwis/peak

has also exceeded 1,000 cfs on an annual basis since approximately 1995. The maximum peak flow at the Trico gage station exceeded 25,000 cfs in 2007 and the minimum peak flow has been at or exceeded 1,000 cfs most years since 1989. The figures at the end of Exhibit C indicate the "real time" stages for late March-early April, 2008, at the Tubac, Cortaro, and Trico Road gage stations indicating flows in the river on a daily basis.[8] All three stations indicated flows with depths varying from 1-2 feet and no precipitation had occurred for approximately 6 weeks.[9] Additional real-time stage data obtained for late May is also provided for Tubac, Green Valley (near Continental), Cortaro, and Trico Road and indicates 1-2 feet of water currently in the channel at all the above locations. Extremely light precipitation occurred one day during this timeframe; however, the amount of precipitation received would not have been sufficient to cause surface flows[10]. A list of the large magnitude peak flow events of the Santa Cruz River over the last 100 years is provided at Exhibit D.[11]

D. While there is a variation in minimum flow required for canoeing, studies indicate the 95% confidence interval on the predicted minimum canoeing flow of 86 cfs for flatwater is 63 to 118 cfs.[12] Approximately two-three feet of water depth is sufficient to float a canoe, kayak, or small boat. Based on the above information, during most days from July-October and again for approximately half the months of December and January, there is sufficient flow in the Santa Cruz River within the Study Reaches to float a canoe (based on the average daily mean value). Typically a kayak would be able to navigate in lower flows and less water than canoes.

E. Based on aerial photographs attached at Exhibit E, the Santa Cruz River from Tubac gage station to just upstream of Continental gage station and Roger Road WWTP to the Pima/Pinal County line has uninterrupted flow.

F. The Arizona Department of Environmental Quality has adopted water quality standards for the Santa Cruz River for partial body contact.[13] Partial body contact allows for use of the surface water where the body comes into contact with the water but does not become fully submerged. Allowable uses under partial body contact would include but are not limited to boating and wading.

2. The Study Reaches within the Santa Cruz River have public accessibility.

A. The river has low banks in the vicinity of Tubac which allows for easy public access; these areas are currently frequented by riders on horseback. Resorts along the river provide access for out-of-state visitors for birding and hiking along the river.

B. Two Corps of Engineers feasibility studies for river restoration, El Rio Medio and Tres Rios del Norte, are in process. El Rio Medio will begin at Congress Street and progress downstream to Prince Road; Tres Rios del Norte will begin at Prince Road and progress

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[8] National Weather Service Advanced Hydrologic Prediction Service: http://www/nws.noaa.gov/oh/ahps/

[9] Personal observation, Marjorie Blaine, Senior Project Manager, Regulatory Division, Tucson Project Office

[10] Ibid

[11] http://www.wrh.noaa.gov/twc/hydro/floodhis.php

[12] Riparian Areas of the Southwestern United States: Hydrology, Ecology, and Management by Malchus B. Baker and Peter F. Ffolliott, CRC Press, 2004

[13] Personal communication with Steve Pawlowski, Arizona Department of Environmental Quality, Unit Manager, Water Quality Standards and Assessments, April 24, 2008.

downstream to Sanders Road in Marana. These projects will provide public trails along the river. Although the final design for these two projects has not been completed, it is likely river access will be provided. The two projects are shown in Exhibit F.

C. There is currently public access to the river at several bridges, including but not limited to the Ina Road bridge where there are pull-out areas, the Cortaro Road bridge (including a parking lot), and at the Sanders Road bridge in Marana. All of these bridges have easy access to Interstate 10.

D. The historic 1200-mile Juan Bautista de Anza National Historic Trail runs from Nogales, Arizona to San Francisco, California. This trail parallels and overlaps the Santa Cruz River in the Study Reaches. The river can be accessed at several points along this trail in the Study Reaches by auto or also on foot (Exhibit F).

3. The Study Reaches of the Santa Cruz River have been used for interstate commerce and have the potential to be used for commercial activities involving navigation and interstate commerce in the future.

A. Navigation has occurred historically and recent times within the Study Reaches of the Santa Cruz River.

(1) On August 23, 2005, as part of a promotion, a local radio show host navigated the Santa Cruz River in a raft for an unspecified distance starting at El Camino del Cerro (within Study Reach B) (Exhibit G).

(2) In October, 1994, two members of the Friends of the Santa Cruz navigated a 17-foot-long canoe from a point south of Tubac three miles to a point north of Tubac (Exhibit G).

B. The Santa Cruz River is an international and interstate water. Several areas along the river provide access for birding by out-of-state visitors and resorts bordering the river, such as the Tubac Golf Resort, host out-of-state visitors who partake in local recreation including hiking, horseback riding, and birding along the river. The Tucson Audubon Society's North Simpson Farm is an area where prolific riparian habitat restoration projects have been focused and it is well-known for its opportunities for birding. This type of "ecotourism" provides a significant water resource-oriented opportunity in the desert. The Study Reaches and other areas within the region receive many interstate and foreign tourists seeking to expand their "bird list"; the Sonoran Desert, particularly in riparian areas such as the Santa Cruz River, provides a significant opportunity to see species endemic to this area.

C. Use of the river within the Study Reaches by recreational watercraft provides evidence of the susceptibility for commercial use.

Determination

Public access points within of the Study Reaches such as low river banks, bridges, and trail systems, together with their physical characteristics, such as frequency, duration, and permanency of flow, indicate that the Study Reaches have the potential to be used for commercial recreational navigation activities, such as canoeing, kayaking, birding, nature and wildlife viewing. Such attractions and activities demonstrate that the Study Reaches may be susceptible to use in interstate commerce. Collectively, the above discussed factors demonstrate that the Study

Reaches are navigable-in-fact, and thus a TNW, susceptible to use in interstate commerce associated with recreational navigation activities. Therefore, I hereby determine that the Study Reaches are subject to the jurisdiction of Section 404 of the CWA, pursuant to 33 C.F.R. § 328.3(a)(1).

This determination does not 1) consider any other potentially applicable bases for determining CWA jurisdiction within the Study Reaches or 2) foreclose analysis of other areas of the Santa Cruz River outside the Study Reaches for purposes of determining CWA jurisdiction.

5/23/08
Date

Thomas H. Magness
Colonel, US Army
District Commander

June 9, 2008

Questions and Answers for the Traditional Navigable Waters Determination for the Santa Cruz River pursuant to the Supreme Court *Rapanos* and *Carabell* Decision

Table of Contents

**Questions and Answers for the
Traditional Navigable Waters Determinations for the
Santa Cruz River**

General Questions on the Corps' Decision Concerning the Santa Cruz River:

1. What decision was made by the U.S. Army Corps of Engineers about the Santa Cruz River?

A. Colonel Thomas H. Magness, Commander of the Corps' Los Angeles District, has determined that two reaches of the Santa Cruz River are "traditionally navigable waters." The two reaches are Tubac gaging station downstream to the Continental gaging station and the River Road Treatment Plant to the Pima/Pinal County line. A copy of the decision document can be found on the District's web site (www.spl.usace.army.mil).

2. Why is this decision important?

A. This decision will facilitate evaluations of tributaries to the Santa Cruz River. Under the Federal Clean Water Act (CWA), the Corps must determine whether particular waterways are covered by CWA jurisdiction. Pursuant to authority under Section 404 of the CWA, the Corps regulates discharges of dredged or fill material into such jurisdictional waterways. Section 404 provides the Corps mandate to safeguard traditional navigable waters (TNW), relatively permanent waters and directly abutting wetlands, as well as other waters and adjacent wetlands possessing a significant nexus to a TNW.

3. Are other portions of the Santa Cruz River considered traditional navigable waters?

A. No determination has been made. The Corps Los Angeles District Regulatory Division will continue to evaluate other portions of the Santa Cruz River as possible traditional navigable waters. If sufficient evidence is identified to warrant designating additional reaches of the river as traditional navigable waters, the Corps will document those findings and publish them on the District's web site (www.spl.usace.army.mil).

4. Why was it necessary to evaluate the Santa Cruz River as a traditional navigable water?

A. A 2006 U.S. Supreme Court decision followed by joint 2007 Corps and Environmental Protection Agency (EPA) implementing guidance for that decision requires much more detailed analysis in order to assert CWA

jurisdiction over wetlands, rivers, tributaries, and other waters. As part of this analysis required to determine jurisdiction, the location of the nearest traditional navigable water must be identified. Several property owners and public agencies within Pima County (which is within the Santa Cruz River Watershed) requested a CWA jurisdictional determination for their property, and the District Engineer's evaluation was initiated as part of the response to that request.

General Questions on the *Rapanos and Carabell* Supreme Court Decision:

5. What is the significance of the *Rapanos and Carabell* decision (hereinafter referred to as *Rapanos)* with respect to Clean Water Act (CWA) jurisdiction?

A. The Supreme Court decision did not affect CWA jurisdiction over traditional navigable waters (TNW) or wetlands adjacent to TNWs. The *Rapanos* opinions established two different standards for establishing jurisdiction over all other waters. The first standard, that given by the plurality opinion, finds CWA jurisdiction if the water body is "relatively permanent," or is a wetland directly abutting a relatively permanent water. The second standard, that given by Justice Kennedy, finds CWA jurisdiction if a water body, in combination with all wetlands adjacent to that water body, has a "significant nexus" with traditional navigable waters. Justice Kennedy identifies a "significant nexus" as existing where those waters significantly affect (i.e., the effect is more than speculative or insubstantial) the chemical, physical, and biological integrity of the traditional navigable water.

The *Rapanos* decision did not affect CWA jurisdiction over traditional navigable waters and their adjacent wetlands.

6. The *Rapanos* opinions seem to agree that navigable waters are protected under the CWA, but do not define that term. How do the Corps and EPA (the "Agencies") define "navigable waters"?

A. Section 502(7) of the CWA defines the term "navigable waters" as "the waters of the United States, including the territorial seas." The Agencies' regulations further define the term "waters of the United States" at 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s).

7. What is "a traditional navigable water"?

A. "A traditional navigable water" includes: 1) all of the "navigable waters of the United States" defined in 33 C.F.R. Part 329; 2) all waters determined navigable by numerous decisions of the Federal courts; as well as 3) all other

waters that are navigable-in-fact.

8. What does "adjacent" mean if a wetland is "adjacent to a traditional navigable water"?

A. "Adjacent," as defined in Corps and EPA regulations, means "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"

9. What is a "tributary"?

A. A "tributary," as defined in the *Rapanos* guidance document, means a natural, man-altered, or man-made water body that carries flow directly or indirectly into traditional navigable waters. For purposes of determining "significant nexus" with a traditional navigable water, a "tributary" is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).

10. What does "abutting" mean if a wetland is adjacent to a tributary?

A. Wetlands that are not separated from the tributary by an upland feature, such as a berm or dike, are "abutting."

11. What does the term "relatively permanent" mean?

A. In the context of CWA jurisdiction post-*Rapanos*, a water body is "relatively permanent" if its flow is year round or its flow is continuous at least "seasonally" (e.g., typically 3 months). Wetlands adjacent to a "relatively permanent" tributary are also jurisdictional if those wetlands directly abut such a tributary.

12. In the context of CWA jurisdiction post-*Rapanos*, what does the term "significant nexus" mean?

A. A water body is considered to have a "significant nexus" with a traditional navigable water if its flow characteristics and functions in combination with the ecologic and hydrologic functions performed by all wetlands adjacent to such a tributary, significantly affect the chemical, physical, and biological integrity of a downstream traditional navigable water.

General Questions on the Corps/EPA *Rapanos* Guidance:

13. What is the purpose of the *Rapanos* guidance document?

A. The guidance document provides guidance to CWA section 404 field staff promoting clarity and consistent application of legal mandates enunciated in the *Rapanos* decision.

14. Did any Federal agency have the opportunity to review the *Rapanos* guidance document prior to its release?

A. Yes, several Federal agencies, including, the Department of the Army and the Corps of Engineers, the EPA, Dept. of Transportation, Council on Environmental Quality, Office of Management and Budget, and Dept. of Interior, reviewed the document prior to its release.

15. Does the *Rapanos* guidance broaden or narrow CWA jurisdiction as compared with CWA jurisdiction asserted by the Corps and EPA before the *Rapanos* decision?

A. The guidance does not broaden or narrow CWA jurisdiction. The guidance document reflects the scope of CWA jurisdiction enunciated by the U.S. Supreme Court in *Rapanos*.

The guidance document, based on the *Rapanos* decision, discusses the application of two new analytical standards, plus a greater level of documentation, to support an agency finding that there is the presence or absence of CWA jurisdiction over a particular water body.

16. How does the guidance address swales, erosional features, and small washes?

A. Swales and erosional features (e.g., gullies, small washes characterized by low volume, infrequent, and short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. Likewise, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States, because they are not tributaries and they do not have a significant nexus to downstream traditional navigable waters.

Even when not jurisdictional waters subject to CWA § 404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic

connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., "discernible, confined, and discrete conveyances"), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).

Certain waters in the arid west may be tributaries having a significant nexus to a downstream traditional navigable water. For example, in some cases they may serve as a transitional area between the upland environment and the traditional navigable waters. During and following precipitation events, tributaries collect and transport water and sometimes sediment and other pollutants from the upper reaches of the landscape downstream to the traditional navigable waters. These tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

17. How does the *Rapanos* guidance address ephemeral or intermittent waters?

A. The jurisdictional status of ephemeral or intermittent waters depends on whether such waters meet either the plurality or Kennedy standard as described above. Waters that flow only following precipitation events (ephemeral) will need to meet the Kennedy significant nexus standard to be jurisdictional. Intermittent streams will either need to flow at least seasonally to meet the Scalia permanent flow standard, or will have to meet the Kennedy significant nexus standard to be jurisdictional.

<u>Questions on Jurisdictional Determinations Requiring a "Significant Nexus" Evaluation:</u>

18. Which aquatic resources will require, as a matter of law, a "significant nexus" evaluation for the Corps to assert or decline CWA jurisdiction?

A. A "significant nexus" evaluation is required to assert CWA jurisdiction over the following categories of water bodies: 1) non-navigable tributaries that are not relatively permanent, including their adjacent wetlands; and 2) wetlands adjacent to, but not directly abutting, a relatively permanent tributary.

In addition, a policy decision has been made to collect information relevant to a significant nexus evaluation for all "intermittent" non-navigable

tributaries and their adjacent wetlands, (i.e., even if the tributary's flow may be relatively permanent, but is not perennial).

19. How will the Agencies evaluate "significant nexus" to traditional navigable water with respect to tributaries that have adjacent wetlands?

A. If the tributary has adjacent wetlands, the significant nexus evaluation must assess the aquatic functions performed by the tributary itself and in combination with the aquatic functions performed by the tributary's adjacent wetland(s), as these functions relate to the chemical, physical, and biological integrity of a downstream traditional navigable water.

20. How will the Agencies evaluate "significant nexus" to traditional navigable water with respect to adjacent wetlands?

A. If the wetlands are adjacent to a tributary, the significant nexus evaluation must assess the aquatic functions performed by the tributary itself, in combination with the aquatic functions performed by the tributary's adjacent wetland(s), as these functions relate to the chemical, physical, and biological integrity of a downstream traditional navigable water.

21. Do the Agencies believe that "significant nexus" is different for tributaries that have no adjacent wetlands as opposed to tributaries that do have adjacent wetlands?

A. Although different methods and considerations may be used to determine if a significant nexus exists for a tributary that has no adjacent wetlands as opposed to a tributary that has adjacent wetlands, the basic concept of "significant nexus" is the same. For both types of tributaries, the significant nexus evaluation is based upon the aquatic functions performed by the reach of water body under consideration, including any and all of that water body's adjacent wetlands. The Agencies must demonstrate whether those functions will have a significant effect (more than speculative or insubstantial) on the chemical, physical, and biological integrity of a traditional navigable water.

22. Who is responsible for performing the jurisdictional determination and documenting the findings?

A. The Agencies will be responsible for performing the jurisdictional determination in a CWA Section 404 context and documenting the findings.

23. Will small tributaries and their adjacent wetlands that are distant from traditional navigable waters no longer be jurisdictional?

A. No. Tributaries and adjacent wetlands, even distant ones, meeting the significant nexus standard, will still be subject to CWA regulation.

Program Impacts:

24. Will the Corps revisit jurisdictional decisions made prior to the *Rapanos* decision?

A. Yes, but only if the applicant requests revisitation. The new review will focus on information affected by the *Rapanos* decision. The Corps will not otherwise revisit jurisdictional determinations that were completed prior to the *Rapanos* decision.

Questions Regarding State/Tribal Programs to Protect Aquatic Resources

25. How does the definition of "waters of the United States" under the CWA affect State or Tribal efforts to protect wetlands?

A. An important component of successful implementation of the CWA section 404 program is a close working relationship with the States and Tribes. States and Tribes may assume operation of the section 404 program, and to date two States have done so (Michigan and New Jersey). Many States and Tribes have chosen to protect wetlands under State/Tribal law, while working cooperatively with the Federal agencies without formally assuming the 404 program. The CWA establishes a baseline level of protection; nothing in federal law prevents states from providing greater protection.